Supreme Court, U.S.
FILED

134 (D)

09-126 JUL 23 2009

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IN THE
SUPREME COURT OF THE UNITED STATES

ALEX TANDIONO,
PETITIONER,

VS.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether, based on the long history of anti-Chinese sentiment and religious clashes in Indonesia, the Petitioner, a Chinese Catholic Indonesian, has a well-founded fear of future harm if returned to Indonesia on account of his ethnicity and religion and therefore, he is eligible for the relief in the form of asylum?

2. Whether Petitioner, a member of the "disfavored group" in Indonesia, is eligible for the alternative relief in the form of withholding of removal because there is a clear probability that his life or freedom will be threatened if returned to Indonesia on account of his Chinese ethnicity and Catholic religion?

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for Petitioner, in compliance with Rule 14(b) and rule 29.6 of the Rules of the Supreme Court of the United States, certifies the following listed person and parties have an interest in the outcome of this case:

1. US Court of Appeals for the Sixth Circuit, Respondent
2. Eric H. Holder, Jr., U.S. Attorney General, Respondent
3. Gregory G. Katsa, Attorney for Respondent
4. Emily Anne Radford, Attorney for Respondent
5. Molly Debusschere, Attorney for Respondent
6. The Board of Immigration Appeals
7. Charles E. Pazar, Immigration Judge
8. Cindy S. Chang, Attorney for Petitioner
9. Alex Tandiono, Petitioner

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STATEMENT OF JURISDICTION

On May 1, 2009, the US Court of Appeals for the Sixth Circuit denied the Petitioner's petition for review. This Court's jurisdiction to grant the review on a writ of certiorari is discretional. The judicial discretion is warranted here because there are legal questions of exceptional importance involved in this case.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

1. 8 U.S.C. Section 1101 (a)(42)(A)
2. INA Section 101(a) (42)(A)

STATEMENT OF THE CASE

This is an immigration case. Petitioner is a native and citizen of Indonesia with Chinese ethnicity and Catholic belief. Petitioner petitions for a writ of certiorari of the US Court of Appeals for the Six Circuit's May 1, 2009 decision.

Petitioner was admitted to the United States in January 1997 as a nonimmigrant visitor and changed his status to student in May 1997. Petitioner failed to maintain his student status, and it expired in February 2005. However, due to the fear to return to his home country, Petitioner had filed an application for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT") in September 2004.

During the removal proceedings, Petitioner credibly testified that he came to the United States because Indonesia is unsafe and he wanted to be in a safe country. He also testified that he did not file his application for asylum until 2004 because he thought he would go back to Indonesia when the country conditions would get better, but they did not.

As Chinese Christian Indonesians, Petitioner and his family members had suffered persecution in Indonesia on account of their ethnicity and religion. As the long history of violence against Chinese descendents in Indonesia, and also, the still dangerous condition in Indonesia, Petitioner finally applied for asylum due to his fear to return to Indonesia.

On October 6, 2005, the Immigration Judge ("IJ") issued a written decision denying petitioner's application for asylum, withholding of removal and CAT. Petitioner, through his former counsel, appealed to the Board of Immigration Appeals ("BIA").

On March 19, 2007, BIA affirmed, without opinion, the IJ's decision. However, Petitioner was never informed about that decision.

On February 27, 2008, BIA reissued its previous decision based on the ineffective assistance of counsel claim filed by Petitioner.

Petitioner then filed a timely Petition for Review to the US Court of Appeals for the Sixth Circuit Court.

Unfortunately that petition was denied on May 1, 2009.

ARGUMENT

A. Petitioner is eligible for the relief in the form of asylum because he is a "refugee" and he has a well-founded fear of returning to his home country, Indonesia, on account of his Chinese ethnicity and Catholic religion.

1. Petitioner is a "refugee" as defined by the Immigration and Nationality Act ("INA").

A refugee is: "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country is which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA Section 101(a)(42)(A), and 8USC Section 1101(a)(42)(A).

Petitioner is a refugee because he is not willing to return to Indonesia on account of his Chinese ethnicity and Catholic religion. Further, Petitioner is a refugee because the Indonesia government has shown its unwillingness or inability to protect Petitioner.

2. Petitioner has a well-founded fear of future harm on account of his Chinese ethnicity and Catholic religion.

In Singh v. INS, 94 F.3d 1353, 1358 (9th Cir. 1996), the Court found "Persecution may be found by cumulative, specific instance of violence and harassment toward an individual and her family members not only by the government, but also by a group the government declines to control." (Citing Shirazi-Parsa v. INS, 14 F.3d 1424, 1428 (9th Cir. 1994)) The 9th Circuit Court in Singh, supra, also found "Discrimination, harassment, and violence by groups the government is unwilling or unable to control can also constitute persecution." Id. at 1539 (citing Arteaga v. INS, 836 F.2d 1227, 1231 (9th Cir. 1988)) Furthermore, the Court in Sangha v. INS, 103 F.3d 1482, 1487 (9th Cir. 1997) found "A single isolated incident may not "rise to the level of persecution, [but] the cumulative effect of several incidents may constitute persecution.

In this case, Petitioner did not provide any evidence regarding his personal past persecution. However, Petitioner has provided evidence to show that his first-hand experience with regard to how the Chinese Indonesians were repeatedly harassed, discriminated, and attacked by the native Indonesians. Petitioner's family members suffered violent attacks targeted at them just because they are Chinese Indonesians. Further, the suffering inflicted on Petitioner's family members because they are Chinese descendents were not simply a "minor disadvantage or trivial inconvenience." See Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969). It amounted to "the infliction of suffering or harm upon one who suffers in race, religion, or political opinion in a way regarded as offensive." Based on his personal knowledge/experience of what Chinese Indonesians

had to endure, and also, the historic violence toward the Chinese people in Indonesia, Petitioner's fear of returning to Indonesia is well founded. Therefore, Petitioner is eligible for the relief in the form of asylum

B. In the alternative, Petitioner is eligible for the relief in the form of withholding of removal because he is a member of "disfavored group" in Indonesia, and there is a clear probability that he will suffer future harm if returned to Indonesia based on the long history of anti-Chinese sentiment and volatile country condition.

In Sael v. Ashcroft, 386 F.3d 922, 924 (9th Cir. 2004). the Ninth Circuit Court held that: "Given Indonesia's history of anti-Chinese violence and official discrimination, we hold that Sael's evidence compels the conclusion that Indonesia's ethnic Chinese minority is at least a Disfavored group" The Court further held that: "certain individuals with [Sael's] characteristics-Christian of Chinese ethnicity-could have a well-founded fear of persecution in Indonesia."

Petitioner testified credibly at the removal proceedings of his fear of returning to Indonesia on account of his Chinese ethnicity and Catholic religion. Although he was never physically harmed, the past experiences Petitioner, his family members and the Chinese Indonesians had suffered with anti-Chinese threats and

violence support a "specific inference of personal danger." See Hartooni v. INS, 21 F.3d 336, 341 (9th Cir. 1994).

In Wakkary v. Holder, 558 F.3d 1049, (9th Cir. 2009) the US Court of Appeals for the Ninth Circuit, for the first time, extended the "disfavored group" analysis to withholding of removal cases. Petitioner, a Chinese Catholic Indonesian is a member of the "disfavored group" as defined by the Ninth Circuit Court's decision in Sael, supra.

The country condition in Indonesia is volatile. The anti-Chinese violence, according to the undisputed Indonesia history, can occur at any time and at any place in Indonesia. Petitioner's life and freedom would be threatened if he had to return to Indonesia because there is a clear probability that he will suffer future harm on account of his Chinese ethnicity and Catholic faith in Indonesia. Therefore, Petitioner's application for relief in the form of withholding of removal should have been granted.

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests this Petition for a Writ of Certiorari be granted.

Dated: July 23, 2009 Respectfully Submitted,

By: /S/ Cindy S. Chang
Cindy S. Chang, Esq.
Attorney for Petitioner,
Alex Tandiono

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No. 08-3295

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
May 01,2009
LEONARD GREEN, Clerk

ALEX TANDIONO,
Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,*
Respondent

ON PETITION FOR REVIEW FROM A FINAL ORDER OF THE BOARD OF IMMIGRATION APPEALS

ORDER

Before: MOORE and MCKEAGUE, Circuit Judges; FORESTER, District Judge.**

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*Pursuant to Fed. R. App. P. 43(c)(2), Attorney General Eric H. Holder, Jr., has been substituted for former Attorney General Michael B. Mukasey as the respondent in this case.

**The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

APPENDIX A

Alex Tandiono, a native and citizen of Indonesia, petitions for review of a Board of Immigration Appeals (Board) order that affirmed an Immigration Judge's (IJ' s) decision that denied his application for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). The parties have waived oral argument and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Tandiono entered the United States in January 1997 as a visitor, and changed his status to student in May 1997. Tandiono failed to maintain his student status, and it expired in February 2005. However, Tandiono had filed an application for asylum, withholding of removal, and protection under the CAT in September 2004. In support of this application, Tandiono stated that in 1998, his wife's family was terrorized by Muslims when rocks were thrown into their house and the family's car was damaged, and that riots occurred that year "all over the Indonesian Island." Tandiono also stated that, because he is a Chinese Catholic and his daughter is a U.S. citizen, they would be targeted by the Muslims if forced to return to Indonesia. Tandiono alleged that the conditions in his native country have worsened since he left in 1997 and that the Indonesian government has taken no action to protect its citizens, so that Indonesia is now a "dangerous country."

At an initial hearing in May 2005, Tandiono, represented by counsel, admitted removability. After Tandiono's application was administratively denied, an IJ conducted a full hearing, permitting Tandiono to testify. The IJ issued an oral decision in which he

denied the application. Tandiono filed a timely appeal and the Board affirmed the IJ' s decision on the grounds that: 1) Tandiono had failed to meet his burden of proof for asylum by showing past persecution on account of one of the five grounds set forth in 8 U.S.C. § 1101(a)(42)(A); 2) Tandiono could not establish a clear probability of persecution to qualify for withholding of removal; and 3) Tandiono failed to demonstrate that he faces a clear probability of torture in Indonesia with the acquiescence of public offtcials should he be removed there.

In support of his petition for review, Tandiono asserts that: 1) the Board erred in affirming the IJ' s decision that Tandiono did not suffer past persecution in Indonesia on account of his Chinese ethnicity and Catholic religion; and 2) the Board erred in affirming the IJ's decision that Tandiono failed to demonstrate a well-founded fear of future persecution if he returned to Indonesia.

We deny the petition because the Board's determination is supported by substantial evidence. Tandiono has not challenged the Board's finding that he failed to meet his burden of showing entitlement to protection under the CAT. Therefore, Tandiono has abandoned this claim, and the only remaining issues are whether the Board properly affirmed the IJ's denial of asylum and withholding ofremoval. *See Turner* v. *City of Taylor,* 412 F.3d 629,639 (6th Cir. 2005).

We have jurisdiction over the petitioner's request for asylum pursuant to 8 U.S.C. § 1252(a)(1), and review the Board's decision to determine whether it is supported by substantial evidence.

Mostafa v. *Ashcroft,* 395 F.3d 622,624 (6th Cir. 2005); *Daneshvar* v. *Ashcroft,* 355 F.3d 615, 624 (6th Cir. 2004). We review the Board's factual determinations under the substantial evidence standard, while conclusions of law are reviewed de novo. *Hassan* v. *Gonzales,* 403 F.3d 429,434 (6th Cir. 2005); *Marku v. Ashcroft,* 380 F.3d 982,986 (6th Cir. 2004). We will uphold the Board's factual findings as long as they are "supported by reasonable, substantial, probative evidence on the record considered as a whole." *Yu v. Ashcroft,* 364 F.3d 700, 702 (6th Cir. 2004) (quoting *INS v. Elias-Zacarias,* 502 U.S. 478, 481 (1992)); *Mostafa,* 395 F.3d at 624. We will reverse a factual determination made by the Board only if the evidence not only supports a contrary conclusion, but compels it. *Rreshpja v. Gonzales,* 420 F.3d. 551, 554 (6th Cir. 2005).

The resolution of an asylum request involves a two-part inquiry: 1) whether the alien qualifies as a refugee; and 2) whether the alien merits a favorable exercise of administrative discretion by the Attorney General. *Gila} v. Gonzalcs,* 408 F.3d275, 283 (6th Cir. 2005). The alien has the burden of proof at both stages. *Pilica v. Ashcroft,* 388 F.3d 941, 950 (6th Cir. 2004). "Refugee" is defined as an alien who is unable or unwilling to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § *1101(a)(42)(A);Rreshpja,* 420 F.3d at 554; *Namo v. Gonzales,* 401 F.3d 453,456 (6th Cir. 2005). We may grant a petition for review regarding a factual determination of whether a petitioner qualifies as a refugee only if the evidence is "so compelling that no reasonable factfinder could fail to

find the requisite persecution or fear of persecution." *Gilaj,* 408 F.3d at 283 (quoting *Ouda v. INS,* 324 F.3d 445,451 (6th Cir. 2003)).

Tandiono applied for asylum and withholding of removal based on his race and religion. Tandiono testified that he has never been harmed in Indonesia because of his religion or ethnicity, nor has his immediate family been harmed or threatened. The only violence remotely affecting his relatives was a riot in 1998 which lasted for one week in South Sumatra. According to Tandiono's statement at the hearing, his wife's family ran "far away" from the disturbance, but later returned to their home, and still live there today. Tandiono's Roman Catholic parents are also still living in the city where the riots occurred in 1998, and his father maintains a small business there. Tandiono testified that theIndonesian government does not support Muslim terroristactivity, but the officials sometimes assist in closing churches during times of unrest. Tandiono and his immediate family have never been subjected to threats, harassment or fear tactics, but his family members in Indonesia have communicated events to him by phone, and he has heard news reports of violence in the country.

Tandiono's description of the 1998 riots, unspecified news reports of violence, and unconfirmed reports from family members who still live and maintain a business in his native city is not enough to show a well-founded fear. *See Ivezaj* v. *INS,* 84 F.3d 215,221 (6th Cir. 1996). Rather, Tandiono bears the burden of showing that he would be singled out for persecution if he were removed to Indonesia. *See* 8 C.F.R. § 208.13; *Ivezaj,* 84 F.3d at

221. Persecution, as defined under the regulation, requires more than a "few isolated incidents" and Tandiono has not shown that he was ever personally attacked or harassed based on his race or Catholic religion, to establish a well-founded fear of persecution. *See Akhtar* v. *Gonzales,* 406 F.3d 399, 405 (6th Cir. 2005); *Gumbol* v. *INS,* 815 F.2d 406, 412-13 (6th Cir. 1987). As the Board pointed out, Tandiono's fear of future persecution is further undermined by the undisturbed continued residence of his wife's parents and his own parents in the same city since the 1998 riots.

According to the current U.S. State Department reports, Indonesian authorities have made an effort to protect similarly situated individuals, and Tandiono may find safety residing in areas within Indonesia where Christians predominate or form a substantial minority community. These findings by the Board were reasonable and Tandiono has not pointed to any evidence that compels an opposite conclusion. Thus, we will not disturb the Board's interpretation ofthe country reports of record. *See Kouljinski* v. *Keisler,* 505 F.3d 534, 544 (6th Cir. 2007). Therefore, we deny Tandiono's petition to review the denial of his request for asylum.

The Board's decision to affirm the denial of Tandiono's request for withholding of removal is supported by substantial evidence, as well. The Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group,

or political opinion. 8 U.S.C. § 1231(b)(3)(A); *Vasha* v. *Gonzales,* 410 F.3d 863,875 (6th Cir. 2005). To succeed on a request to withhold removal, an alien must show that there is a clear probability that the alien would be subject to persecution if he or she returned to the country in question. *Rreshpja,* 420 F.3d at 557. Because Tandiono failed to meet the standards for granting asylum, he has also failed to meet the more rigorous standards that are required for the withholding of removal. *Id.*

Accordingly, the petition for review is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green Clerk

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A98 701 763 - Memphis, TN

Date: FEB 27 2008

In re: ALEX TANDIONO

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Cindy S. Chang, Esquire

ON BEHALF OF DHS:
Harris Lee Leatherwood, Assistant Chief Counsel

REISSUED DECISION

We dismissed the respondent's appeal on March 19, 2007. On October 19, 2007, the respondent filed a motion to reopen. The motion to reopen has been filed out of time. *See* 8 C.F.R. § 1003.2(c)(2). The Department of Homeland Security ("DHS") opposes the pending motion. The Board will reopen proceedings under its *sua sponte* authority pursuant to 8 C.F.R. § 1 003.2(a), and reissue the March 19,2007, decision.

APPENDIX B

The respondent alleges that his former attorney failed to inform him of our earlier decision, so that he could pursue a timely motion to reopen with the Board; or petition for review with the United States Court of Appeals for the Sixth Circuit, the jurisdiction wherein this case arises. We find the respondent has met the requirements for making an ineffective assistance of counsel claim as set forth in *Matter of Assaad,* 23 I&N Dec. 553 (BIA 2003), and *Matter of Lozada,* 19 I&N Dec. 637 (BIA1988). Moreover, although the motion has been filed out of time, the respondent has shown that he exercised due diligence upon learning of the Board's decision in the filing of the instant motion. *See Tapia-Martinez v. Gonzales,* 482 FJd 417, 422 (6th Cir. 2007) (citing to *Scorteanu v. INS,* 339 F.3d 407, 414 (6th Cir. 2003) ("Due diligence requires an alien to prove that the delay in filing the motion to reopen was due to 'an exceptional circumstance beyond his contro!.') and *Iturribarria v. INS,* 321 F.3d 889, 897 (9th Cir.2003) (stating that the petitioner must exercise due diligence in discovering the error, deception, or fraud before equitable tolling will apply)). Thus, under the controlling authority of the Sixth Circuit, the respondent's motion appears to meet the equitable tolling guidelines. *See Id.; see also Harchenko v. INS,* 379 F.3d 405,409-10 (6th Cir.2004) ("This court has previously noted that the time for filing a motion to reopen can be equitably tolled ... ").

Therefore, the Board's March 19, 2007, decision will be reissued and treated as if entered on today's date. *See Firmansjan* v. *Ashcroft,* 347 F.3d 625 (7th Cir. 2003) (Board has authority to reissue decision).

ORDER: The respondent's motion to reissue is granted.

FURTHER ORD ER: The Board's decision dated March 19,2007, attached hereto, is hereby reissued and shall be treated as entered as of to day's date.

FURTHER ORDER: The respondent is granted 60 days from this date within which to voluntarily depart the United States under the terms of the Board's prior order, attached hereto.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A98-701-763 - Memphis

Date: MAR 19, 2007

In re: ALEX TANDIONO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
T. Darnell Flowers, Esquire

ON BEHALF OF DHS:
John F. Cook II, Assistant Chief Counsel

ORDER:

PER CURIAM. The respondent has appealed from the Immigration Judge's decision dated October 6,2005, denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture. The appeal will be dismissed.

The Immigration Judge observed that the respondent failed to file his asylum application

within 1 year of his arrival in the United States, but he did not make a finding that the respondent was ineligible for asylum on this basis. We note that maintenance of lawful nonimmigrant status qualifies as an extraordinary circumstance that excuses the untimely filing of the respondent's application. *See* 8 C.F.R. § 1208.4(a)(5)(iv).

We find no error in the Immigration Judge's determination that the respondent failed to meet his burden of proof for asylum. The respondent suffered no past persecution in Indonesia on account of his religion, race, or any of the other grounds enumerated in section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A). *See INS v. Elias-Zacarias,* 502 U.S. 478 (1992). The respondent's claim to a well-founded fear of future persecution is undermined by the undisturbed residence of his wife's parents and his own parents in Indonesia since the 1998 riots (I.J. at 4, 7). The background materials in evidence also reflect that Indonesian authorities have made an effort to protect similarly-situated individuals, and they suggest that the respondent may find safety residing in areas within Indonesia where Christians predominate or form a substantial minority community. The respondent did not establish that he or his family might be targeted on account of his child's status as a United States citizen.

Having failed to meet the lower burden of proof for asylum, the respondent cannot establish a clear probability of persecution to qualify for withholding of removal. *See* section 241(b)(3)(A) of the Act; 8 U.S.C. § 1231(b)(3)(A); *INS* v. *Stevie,* 467 U.S. 407 (1984). The respondent also failed to

demonstrate that he faces a clear probability of torture by or with the acquiescence of a public official or other persons acting in an official capacity upon removal to Indonesia, so as to qualify for protection under the Convention Against Torture. *See Amir* v. *Gonzales,* 467.F.3d 921 (6th Cir. 2006); 8 C.F.R. §§ 1208.16(c)(2) and 1208.18(a)(l). We note that in denying Torture Convention relief, the Immigration Judge incorrectly stated that the Torture Convention affords no protection from persons whom authorities will not control (1.1 at 8). *See Amir* at 927. However, as the respondent did not establish any likelihood of torture in Indonesia with or without governmental invo lvement in any manner or degree, we find the error to be harmless.

We do not find that the Immigration Judge erred in excluding testimony from the respondent's wife because the respondent failed to identify his wife as potential witness, so as to allow the Department of Homeland Security time to prepare for cross-examination of the witness (Tr. at 9-10). Moreover, we note that the respondent did not contest the Immigration Judge's ruling or make an offer of proof, and he indicated that the substance ofthe witness' testimony was already incorporated into his asylum application .

Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within

60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). In the event of the failure to so depart, the respondent shall be removed as provided in the Immigration Judge's order. *See* section 240B(b) of the Act; 8 C.F.R §§ 1240.26(c), (f).

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than $1,000 and 110t more than $5,000, and shall be' eligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 2 8, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

FOR THE BOARD

IMMIGRATION COURT
167 N. MAIN STREET, ROOM 460
MEMPHIS, TN 38103

In the matter of
TANDIONO, Alex — Case No.: A98-701-763
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IIMMIGRATION JUDGE

This is a summary of the oral decision entered on October 6, 2005.
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to or in the alternative to

[ ] Respondent application for voluntary departure was denied and respondent was ordered removed to
Or in the alternative to

[x] Respondent application for voluntary departure was granted until December 5, 2005 upon posting a bond in the amount of $ 500.00 by October 13, 2005 with an alternate order of removal to Indonesia

Respondent's application for:

[x] Asylum was ( ) granted (x) denied ( ) withdrawn

[x] Witholding of removal was ( ) granted (x) denied ( ) withdrawn

APPENDIX D

[ ] A waiver under section _____ was ( ) granted ( ) denied ( ) withdrawn

[ ] Cancellation under section 240A (a) was ( ) granted ( ) denied ( ) withdrawn

Respondent's application for:

[ ] Cancellation under section 240A (b) (1) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Cancellation under section 240A (b) (2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Adjustment of status under section _____ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[x] Respondent's application of (x) withholding of removal ( ) deferral of removal under article III of the Convention Against Torture was ( ) granted (x) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under Section 246.

[ ] Respondent is admitted to the United States as A _____ until _____

[ ] As a condition of admission, respondent is to Post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: October 6, 2005

_____

CHARLES E. PAZAR
Immigration Judge

U.S. DEPARTMENT OF JUSTICE EXECUTIVE
OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT

MEMPHIS, TENNESSEE

File A 98 701 763 October 6, 2005

In the Matter of
ALEX TANDIONO, Respondent

IN REMOVAL/"PROCEEDINGS

GROUNDS: Section 237 (a) (1) (C) (I).

APPLICATION: Asylum; withholding of removal; Torture Convention relief; voluntary departure.

RESPONDENT'S COUNSEL:
T. Darnell Flowers, Esquire

GOVERNMENT COUNSEL:
John F. Cook II, Esquire

ORAL DECISION AND ORDER

Respondent is a married male, 36 years of age, native and citizen of Indonesia. Based upon admissions made by his attorney at a previously held master calendar hearing the Court sustained the charge and found respondent to be subject to removal as a non-immigrant who has failed to maintain or

comply with the conditions of his change of status, in violation of Section 237(a) (1) (C) (I) of the Act.

Statement of the Case

Exhibit 2 and attachments is the transmittal from the DHS's Houston asylum office which began the case before this Court. The Court allowed late filing of exhibits in support of the application at Exhibit 4 and 5. There was some question whether Exhibit 4, a letter from a Roman Catholic Church in Conway, Arkansns, and Exhibit 5, which purports to be an affidavit from respondent's sister-in-law in Indonesia, were properly attached to the application. The Immigration Judge allowed them to be admitted into the record of proceedings but because of their lateness will give them limited weight, especially in the light of the fact that Exhibit 5 does not have with it an Indonesian interpretation in which can be compared against this English original. Or more properly stated, there is no Indonesian original against which this English interpretation that is translation can be compared.

The Court caused to be admitted the Government's Exhibit 3 which consists of the Country Report for Indonesia and the State Department report on International Religious Freedom for Indonesia. The Court also (indiscernible) introduced Exhibit 6, which is an issue paper which the State Department issued in May, 2005 entitled Christians in Indonesia. Thus, background materials are found at Exhibits 3 and 6.

Respondent testified that he is a Roman Catholic from Indonesia. He testified that he came to the United States because Indonesia is unsafe and that he wanted to be in a safe country. He testified that he did not file his

application for asylum until 2004 because he thought that he was going to go back to Indonesia and that things would get better but they did not get better, they only got worse.

The sole incident on which respondent bases his application is his assertion that his in-law's house in Indonesia was damaged and that they had to escape for a week during communal rioting in May, 1998. Respondent testified that nothing happened to him at any time in Indonesia because of his religion. He testified that he fears that his daughter who is a United States citizen and a Roman Catholic would be injured if returned to Indonesia but he presents no evidence that United States citizens are being injured or persecuted in Indonesia.

Respondent (indiscernible) that the police would not protect Christians in Indonesia because Muslims don't like Roman Catholics or Chinese. Respondent went so far as to state that the police sometimes support the closing of churches although what he meant was apparently blocking of traffic in front of churches and not the permanent closure of churches.

On cross-examination, respondent testified that both his wife's parents and his parents continue to live on the island of South Sumatra. In fact in the same city in which they lived before the riots, Pelanbang P-E-L-A-N-B-A-N-G. The record contains no evidence that anything has happened to them since May 1998.

Late filed Exhibit 5 is not accompanied by an Indonesian original and so the Court gives this

limited weight. The affidavit states that rioters threw stones at the home occupied by respondent's wife's sister and that one of their cars was burned and that they ran away but were given sanctuary by local Muslims.

The affidavit does not state that the family has moved or that they have sold their business or that there have been continuing problems with Muslim extremists. Respondent did not offer any testimony that his in-laws suffered further problems since May 1998. However, respondent testified in a general way about his fear of returning to Indonesia because of nightclub bombings in Bali and. his repeated assertions the churches have been closed.

The issue paper on Christians in Indonesia at Exhibit 6 is a distillation of Exhibit 3B. This document reports that there are 18 million Christians in Indonesia out of a total of 240 million people. This paper goes on to note that Christians form a distinct minority or even a majority in certain parts of Indonesia and that relocation is an option for Christians in Indonesia. The paper reports what is also set forth elsewhere in Exhibit 3, that while Christian churches have occasionally in 2004 been attacked, the number is really a handful, and that the government has been attempting to investigate such activities and arrest the perpetrators, notwithstanding respondent's flat statement that the government in Indonesia does nothing to protect Christians.

Now respondent did not call his wife to testify but relies on statements incorporated by reference in the application for asylum. Respondent testified or his lawyer

made representations that respondent's wife is still in an F1 or F2 status and has not fallen out of status. Respondent and his wife have a young daughter who was born in the United States.

Findings of Fact, Conclusions of Law, and Statement of of Relevant Law

Findings of Fact One: the application is not timely.

The threshold issue in this case is whether respondent's application, filed in 2004, is timely. The statute requires that a respondent demonstrate by clear and convincing evidence that his application was filed within one year of his arrival in the united States or that he demonstrate that the delay was reasonable under the circumstances. Regulations found at 8 C.F.R. Section 1208.4 set out some of those circumstances to include maintenance of lawful non-immigrant status to a reasonable period before the filing of the asylum application.

Respondent filed his application while still in status so one could say that he filed within a reasonable amount of time after falling out of status, namely before he even fell out of status. But filing while in status calls into question why he waited seven years to file when the respondent came to the United States in 1997 and the incidents that gave rise to his claim occurred in 1998.

While the Court believes that respondent has not shown that the timeliness has been met, the Board may conclude to the contrary so the Court will consider this application as one for both withholding of removal, which it more properly is, and one for asylum.

Finding of Fact Two: respondent is credible.

Applying the 6th Circuit case law concerning credibility, and not determining whether the real I.D. Act requirement set out in that section of law applied, the Court finds as a matter of fact, (indiscernible) v. Ashcroft, 364 F.3d 700 (6th Cir. 2004), that the respondent's testimony is credible in that it is consistent with the 1-589 and described an incident that is widely reported, namely the communal riots of May 1998. The Court also finds respondent's testimony to be less than convincing and notes that respondent continued to testify in English even though the Court repeatedly told the respondent to testify in Indonesian so there would be no misunderstanding. Respondent's testimony tended to be sparse, skimpy, and very general but technically credible.

Conclusion of Law One: respondent has not shown a well- founded fear of persecution or a clear probability of persecution.

Under either standard, respondent has failed to show that he would be harmed on account of his race, religion, nationality, political opinion, or membership in a particular social group. Applying the asylum standard, he has not shown a well-founded fear on account of one of five protected grounds. Koliada v. INS, 259 F.3d 482, 487 (6th Cir. 2001), INS v. Elias-Zacarias, 502 U.S. 478 (1992).

Assuming arguendo that his in-law's had experienced property damage in May 1998, the Court finds that this does not mean that objectively, in Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987), that respondent

has a well-founded fear. Nothing ever happened to respondent in Indonesia because of his religion.

The background material found at Exhibits 3 and 6 do not show that respondent has an objectively reasonable wellfounded fear. The State Department carefully describes the situation as it relates to Christians in Indonesia and the Court notes that respondent has available to him the opportunity to relocate elsewhere in the country to escape discrimination. Further, the people who supposedly were victimized by this riot in May 1998, namely his in-laws, remain in the same island, even in the same city. There is no evidence that they are not able to go back to work and there is no evidence that they have left.

The same thing could be said for respondent's parents who like the respondent are life-long Roman Catholics living in Pelanbang. Nothing has happened to them as far as the evidence of record.

To be eligible for withholding of removal, respondent must demonstrate a clear probability of persecution on account of one of the five protected grounds. INS v. Stevic, 467 U.S. 407 (1984). The Court finds that the respondent has not met his burden especially in light of the background material and in light of the fact that nothing happened to him in Indonesia.

Respondent submits his Torture Convention claim to the Court. The Court explicitly makes a credibility finding that respondent is credible as to his Torture Convention claim. However, respondent has utterly failed to show that it is more likely than not that he would be tortured by the government of Indonesia. This is because nothing has happened to him. And the best that could be

said from a Torture Convention point of view is that persons who the government cannot or will not control may have damaged his in-law's property. The Torture Convention does not comprehend that actions by such a group merit protection under the Torture Convention. Ali v. Reno, 237 F.3d 591 (6th Cir. 2001).

The respondent is eligible for the privilege of voluntary departure and the Court will grant his voluntary departure according to the terms and conditions set forth below.

Accordingly the Court enters this order:

ORDER

Respondent's applications for asylum, withholding of removal, and for Torture Convention relief are denied;

Respondent is granted voluntary departure up to and including December 5, 2005. Respondent shall post a bond of $500 with the Department of Homeland Security respondent does not post the bond, the order of voluntary departure will automatically convert to an order of removal against respondent to Indonesia. Respondent will then be ineligible for voluntary departure, adjustment of status, and cancellation of removal for a period of 10 years and he will be subject to civil penalties of not less than $1000 nor more than $5000.

CHARLES E. PAZAR
Immigration Judge